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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 274

COMMERCIAL PICTURES CORPORATION,
Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York;
CHARLES A. BRIND, JR.,
Counsel for the Board of Regents of the University of the State of New York and the State Education Department,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above-entitled cause, for their statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issue on Appeal

The question sought to be presented in this appeal is appellant's claim that Sections 122, 124, 129 and 131 of the New York State Education Law providing for the examination and licensing of motion picture films exhibited for profit, and for penalties in event of unlicensed exhibitions, violate the First and Fourteenth Amendments of the Constitution of the United States as constituting an unauthorized restraint of freedom of speech or of the press; that

the terms of that statute "immoral" and "of such a character that its exhibition would tend to corrupt morals" are so vague and indefinite as to be unconstitutional and further, that the statute has not been properly applied in this case. These claims the appellees deny and the Court of Appeals of the State of New York, in the opinion and order here challenged, determined the questions adversely to appellant.

The Court of Appeals of the State of New York found that:

> "Section 122 of the Education Law provides that a motion picture shall not be licensed if it is 'obscene, indecent, *immoral*, inhuman, sacrilegious, or is of *such a character that its exhibition would tend to corrupt morals* or incite to crime.'"

The court further found:

> "That a motion picture which panders to base human emotions is a breeding ground for sensuality, depravity, licentiousness and sexual immorality can hardly be doubted. That these vices represent a 'clear and present danger' to the body social seems manifestly clear."

The Court of Appeals further found that the terms "immoral" and "of such a character that its exhibition would tend to corrupt morals", when read in context and in *pari materia* with the other related statutes, are not vague or indefinite but fix a definite and clearly understood standard.

The Court of Appeals further found that the picture depicted promiscuity as the natural and normal relation between the sexes, whether married or unmarried, calling attention to the fact that the film is closely patterned after the book which was condemned for obscenity in *People* v. *Pesky* (230 App. Div. 200, 202, aff'd 254 N. Y. 373) and re-

ferred to the comment of the Appellate Division on this book as follows:

> "there was nothing to it except a description of the licentious * * * without a single redeeming feature."

Such a film may be excluded from public view under the First Amendment.

II. The Story of the Film

From beginning to end the one theme of the film is promiscuity and seduction.

The motion picture "La Ronde" presents a chain of loosely related sequences, each dealing with the amorous adventures of various characters, and one partner in each escapade becoming the principal in the next. It is a series of interlocking love affairs held together by a mythical master of ceremonies. The cycle commences with an encounter between a prostitute and a soldier who is hurrying back to the barracks when he is accosted. The prostitute's room is ten minutes' walk away and since the soldier's time is limited, they take advantage of the local environment. His initial hesitancy is overcome by her assurance that it's civilians who pay; for boys like him it is free. The cycle continues with the soldier and a chambermaid; the chambermaid and the son of her employers; the son and a married woman; the married woman and her husband; the husband and a girl; the girl and a poet; the poet and an actress; the actress and a count, and last of all, the count and the prostitute. The cycle is completed with the soldier saluting the count.

Each scene is the same; the meeting at which sexual intercourse is offered and accepted; the scenes leading up to the act are depicted; the act itself is grudgingly blacked out—

(more so than in the book). The blacking out, while effective in eliminating the actual act, is so poorly done that the sequence is sometimes difficult to follow. The next episode with the new character is sometimes hard to catch, but the central and only theme, the apotheosis of promiscuity, remains clear at all times.

III. No New Federal Question Is Presented by the Attempted Appeal

As we diagnose the gravamen of the questions set forth in the statement of issue on appeal they are of much narrower import than the appellant herein conceives. This court has settled all of the legal issues in this case heretofore. There was nothing left for the lower courts to determine but the applicability of the factual matter involved to the rules.

This court has held, of course, that freedom of speech and freedom of the press, while they are liberties guaranteed by the Constitution of the United States, are not absolute. Where the presence of such unlimited freedom is contrary to public welfare in that the exercise of such freedom would corrupt public morals, this court has concluded that such freedom may be abridged, where necessary, by prior restraint. Specifically in *Near* v. *Minnesota*, 283 U. S. 697, at page 716 this court said in so many words: "the protection against previous restraint is not absolutely unlimited." Consequently the first issue presented by the appellant here is not the broad question of whether the licensure provisions of the State of New York are invalid merely because they require initial examination before licensure, but narrowly, whether the motion picture "La Ronde" falls within the rules established by the Supreme Court. In that connection, this court has concluded that motion pictures as well as books and periodicals are in the

same category in that they are entitled to the protection of the First and Fourteenth Amendments. We take it that at the same time, the rules which have been laid down in such connection must, therefore, be just as applicable to motion pictures as to any of the other types of medium of expression, and when the Court of Appeals applied the rule as "to clear and present danger" to motion pictures, it was applying the law as settled by this court. In other words, the court has held innumerable times that where there is "a clear and present danger" it is wholly within constitutional authority for the State to eliminate the occurrence before it happens. See in particular:

Shenk v. *United States*, 249 U. S. 47, 52
Gitlow v. *New York*, 268 U. S. 652
Terminiello v. *Chicago*, 337 U. S. 1
Chaplinsky v. *New Hampshire*, 315 U. S. 568
Near v. *Minnesota*, 283 U. S. 697
Winters v. New York, 333 U. S. 507

The decision under review indicates that its conclusions follow the rule as laid down by this court. The decision indicates further, *as a fact*, that the presentation of the motion picture "La Ronde", because of its immoral and hence indecent content, constituted a clear and present danger. Therefore, the appellant is asking this court, not to establish any new principles of law, but to reverse the New York State Court of Appeals on the ground that the motion picture "La Ronde" does not fall factually within the scope of the rule. This court is not asked to pass upon any new issue of law. We submit, therefore, that this issue does not present such a substantial question as would warrant this court in undertaking a further review of it.

The second basis for appellant's claim for further review, viz. that the term "immoral" (as the term "sacrilegious" in the *Burstyn* case, *infra*) is so indefinite that it should

be stricken from the statute, is in the same category. This court found that there had been no construction of the term "sacrilegious" and that it was difficult to construe that term. Consequently it struck it from the statute as being unconstitutional. On the contrary, however, the term "immoral" has been construed by all of the courts of all of the states on thousands of occasions and any holding by this court that the term "immoral" is indefinite and uncertain without statutory exemplification would invalidate thousands of statutes throughout the United States, and could well affect a vast number of cases which have already been adjudicated. There is nothing so new or strange about *this term* which requires the specific attention of the Supreme Court.

The Penal Law of the State of New York utilizes the term "immoral" or "tend to corrupt morals" in no less than eighteen places to our best count. See Penal Law, § 483-a, § 483-b, § 485, subd. 5, § 485-a, subd. 5, § 486, subd. 3, § 494, § 1140-a, § 1141, § 1141-a, § 1145, § 1147, § 1290, subd. 4, § 2460, subds. 1, 2, 3, 5 and 6, and § 1944-a. See also Penal Law § 483, § 484 and § 1530, and General Business Law § 190 and § 191, subd. 3.

It is further to be noted that under the provisions of the Education Law of the State of New York it is required that each person before being licensed to practice any profession must be of good moral character, and in all cases the license can be revoked if it is shown that the person so practicing is not of good moral character. See Education Law, § 6506, subd. 2, § 6608, subd. 1(b), § 6704, subd. 1(b), § 6803, subd. 1(b), § 6905, subd. 1(b), § 7005, subd. 1(b), § 7105, subd. 1, § 7123, subd. 1(a), (1), § 7205, subd. 1(c) and 2(c), § 7304, subd. 1, § 7404, subd. 1, and § 7502. This is also particularly true of the teaching profession where, from time immemorial, the statute has contained provisions

whereby the license of a teacher may be summarily revoked upon evidence of immoral conduct. See Education Law, § 305, subd. 7, and § 308. See also Education Law, § 3012, subd. 2, and § 3013, subd. 2.

It has never occurred to anyone in regard to these statutes that it is necessary that the Legislature parentally explain to the Commissioner of Education or to the Board of Regents or to the courts the meaning of the term "immoral". The failure of the Legislature to garner together a code of ethics to be applied to the term "moral" or "immoral" is not confined to the State of New York. While the foregoing statutory citations of the use of the terms "moral" and "immoral" are references to New York statutes they are intended merely as illustrations. The statutes of every one of the states as well as the federal statutes are replete with the same or similar terms.

The Supreme Court of the United States in *Swearingen* v. *United States*, 161 U. S. 446, 451 said:

> "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, * * * signify *that form of immorality which has relation to sexual impurity*, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * * [To fall into this category the subject matter must be] * * * of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." (Emphasis supplied.)

Further, is should be noted that in *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U. S. 230, the court determined that the language of the licensing statute there under consideration in which the terms "educational, moral, amusing or harmless" were used provided a sufficient standard and that such terms, "like other general terms, gain precision from the sense and experience of men and become certain and useful guides in reasoning and conduct." This

holding was not overruled by the *Burstyn* case, *infra*, since the court in the *Burstyn* case passed only upon the term "sacrilegious." Except for the term "moral" the terms of the Ohio statute under consideration in that case are much more general terms than those of the statute in the case at bar.

The courts in New York State have dealt with the word "immoral" and various similar words such as obscene and indecent in the following cases in which it is apparent that the Court, without parental legislative guidance, has been thoroughly able to understand and define the words in question. Concerning the Penal Law: *People* v. *Muller*, 96 N. Y. 408; *People* v. *Wendling*, 233 App. Div. 704; 258 N. Y. 451; *People* v. *Eastman*, 116 App. Div. 922; 188 N. Y. 478; *People* v. *Winters*, 268 App. Div. 30; 294 N. Y. 545; (rev. 333 U. S. 507); *Halsey* v. *The New York Society for the Suppression of Vice*, 191 App. Div. 245; 234 N. Y. 1; *People* v. *Eagle*, City Magistrates' Court of the City of New York, November 24, 1952, N. Y. L. J., Vol. 128, No. 110, December 9, 1952; *People* v. *Pesky*, 230 App. Div. 200; 254 N. Y. 373 (upholding a conviction under Penal Law § 1141, for possessing with intent to sell or show an English translation of the book from which the film "La Ronde" is derived).

Concerning the Domestic Relations Law; *In re Brenner's Will*, 44 N. Y. S. 2d 447, aff'd. 522 2nd 792; *Hoops* v. *Hoops*, 266 App. Div. 512 (rev. 292 N. Y. 428); *Matter of Haverly*, 180 Misc. 16. In addition, of course, there are the cases concerning the enforcement of illegal or immoral contracts.

The Federal courts in passing upon the statutes concerning customs have dealt successfully with the word "immoral" in construing Title 19 U. S. C. § 1305 in the following cases: *United States* v. *One Book Entitled "Contraception"*, 51 F.(2d) 525; *United States* v. *One Book Entitled "Married Love"*, 48 F.(2d) 821. In addition, the courts of

our sister states have also successfully determined the meaning of the word "immoral": *Orloff* v. *Los Angeles Turf Club*, Cal. App. 208 P. 2d 987; *Jones* v. *Poole*, 62 Ga. App. 309; *In re Hicks*, 163 Okl. 29; *Moore* v. *Strickling*, 46 West Va. 515; *Grievance Committee* v. *Broder*, 112 Conn. 269.

Thus it appears that there is no substantial question for review with respect to the definiteness of the terms "immoral" and "tends to corrupt morals" as used in the statute under consideration.

Coming to appellant's third objection that it is debatable that the picture is "immoral" as found by the Court of Appeals it seems fundamental that this Court will not take jurisdiction solely for the purpose of testing the facts as to whether the state courts were correct factually.

Appellant relies in large measure on *Matter of Burstyn* v. *Wilson*, 343 U. S. 495. It should be pointed out that while the *Burstyn* case holds New York State censorship statute void on the ground of indefiniteness in so far as it prohibits the showing of "sacrilegious" films it limited its holding specifically to that term, and stated in no uncertain terms that it was not holding that a statute providing for pre-censorship was unconstitutional but on the contrary, indicated that such a statute could well be constitutional if properly drawn.

Appellant also cites *Gelling* v. *Texas*, 343 U. S. 960, where a local censorship ordinance was held unconstitutional. The ordinance in that case provided that a film might be refused a license by the local Board if, in their opinion, the film is "of such character as to be prejudicial to the best interests of the people of said City." The difference between this language and that of the statute under consideration is so apparent as hardly to require any comment. It is obvious that the terms "prejudicial to the best interests of

the people" is a far cry from use of the term "immoral" coupled as it is in the present statute with the terms "obscene", "indecent" and "tends to corrupt morals".

Conclusion

It is, therefore, submitted that when analyzed, the questions which this court are now being asked to review have all been heretofore determined, that they are not new, that there is no new substantial federal question presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfuly move that the within appeal be dismissed or that the judgment and decree of the Court of Appeals of the State of New York be affirmed.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York;

CHARLES A. BRIND, JR.,
Counsel for the Board of Regents of the University of the State of New York and the State Education Department,
Counsel for Appellees.